

## Internal Revenue Service

Department of the Treasury

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TY:

Legend:

Taxpayers	=
Date1	=
Date2	=
Year1	=
Year2	=
Year3	=
M	=
N	=
P	=
X	=
Y	=

Dear \_\_\_\_\_ :

This is in response to the letter dated Date1, submitted on your behalf by your authorized representative. In the letter you request an extension of time to make a late election to include net capital gain and qualified dividend income in net investment income under §§ 163(d)(1) and 163(d)(4)(B) of the Internal Revenue Code for the Year1 and Year2 tax years. The request to make the late election is based on §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

### FACTS

During the years at issue, Taxpayers relied upon the assistance of in-house accountants and third-party CPAs to handle their accounting and financial matters. Since \_\_\_\_\_, Taxpayers used X, and subsequently Y, accounting practice to assist them in preparing their tax returns. X was absorbed into Y on Date2. M, a staff accountant at X and then Y, prepared the workpapers for Taxpayers' Year1 and Year2 tax returns. M

inputted the data into the firm's tax preparation system. In the system, a box must be checked in order to make the election to treat net capital gain and qualified dividend income as net income pursuant to § 163(d)(4)(B). When M entered the data for Year1 and Year2, M failed to check the box needed to make the election. Upon M's, completion of the returns, N, a tax manager, reviewed and signed the returns. N, failed to notice that the elections were not made.

In reviewing Taxpayer's Year3 returns, N checked the Year1 and Year2 returns, analyzing the net operating loss carryover and investment expense carryover to Year3. At that time, N discovered the elections had not been made. N immediately contacted Taxpayers' attorney, P, who prepared the request for a private letter ruling.

#### APPLICABLE LAW

Section 163(d)(1) provides that in the case of a taxpayer other than a corporation, the amount allowed as a deduction for investment interest for any taxable year shall not exceed the net investment income of the taxpayer for the taxable year.

Section 163(d)(4)(B) provides, in part, that investment income means the sum of --

(i) gross income from property held for investment (other than any gain taken into account under clause (ii)(I)),

(ii) the excess (if any) of --

(I) the net gain attributable to the disposition of property held for investment, over

(II) the net capital gain determined solely by taking into account gains and losses from dispositions of property held for investment, plus

(iii) so much of the net capital gain referred to in clause (ii)(II) (or, if lesser, the net gain referred to in clause (ii)(I)) as the taxpayer elects to take into account under this clause. Such term shall include qualified dividend income (as defined in section 1(h)(11)(B)) only to the extent the taxpayer elects to treat such income as investment income for purposes of this subsection.

Section 1.163(d)-1(b) of the Income Tax Regulations provides that the election for qualified dividend income must be made on or before the due date (including extensions) of the income tax return for the taxable year in which the qualified dividend income is received.

Section 1.163(d)-1(c) provides that the election under § 163(d)(4)(B) is revocable with the consent of the Commissioner.

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered under § 301.9100-2) will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer --

(i) requests relief before the failure to make the regulatory election is discovered by the Service;

(ii) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;

(iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;

(iv) reasonably relied on the written advice of the Service; or

(v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make the election.

Section 301.9100-3(b)(3) provides that a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer --

(i) seeks to alter a return position for which an accuracy-related penalty could be imposed under § 6662 at the time the taxpayer requests relief and the new position

requires a regulatory election for which relief is requested;

(ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or

(iii) uses hindsight in requesting relief. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. Under paragraph (c)(1)(i), the interests of the government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made. Under paragraph (c)(1)(ii), the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made is closed by the period of limitations on assessment under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

## CONCLUSION

Taxpayers' election is a regulatory election, as defined under § 301-9100-1(b), because the due date of the election is prescribed in the regulations under § 1.163(d)-1(b). In the present situation, the requirements of §§ 301.9100-1 and 301.9100-3 of the regulations have been satisfied. The information and representations made by Taxpayers establish that Taxpayers acted reasonably and in good faith with this request. The affidavits presented show that Taxpayers reasonably relied on a tax professional for the filing of their returns, however, the tax professional failed to make, or advise Taxpayers to make the elections. The affidavits presented show that Taxpayers were unaware of the necessity for the elections and upon discovery of the errors promptly requested relief.

Taxpayers are not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time relief is requested. Taxpayers were not informed in all material respects of the required election, and its related tax consequences. Furthermore, Taxpayers are not using hindsight in requesting relief. Taxpayers have represented that specific facts have not changed since the original deadline that make the election advantageous to Taxpayers. Moreover, the taxable years in which the regulatory elections should have been made and any taxable years that would have been affected by the elections had they been timely made, are not closed by the period of assessment.

Finally, granting an extension will not prejudice the interests of the Government. It is represented that the Taxpayers will not have a lower tax liability in the aggregate for all

taxable years affected by the election if given permission to make the election in the appropriate amount at this time than Taxpayers would have if the election were made in the appropriate amount by the original deadline for making the election. Accordingly, Taxpayers are granted an extension of time for making the election until 60 days following the date of this ruling.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative(s).

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Thomas D. Moffitt  
THOMAS D. MOFFITT  
Chief, Branch 2  
(Income Tax & Accounting)